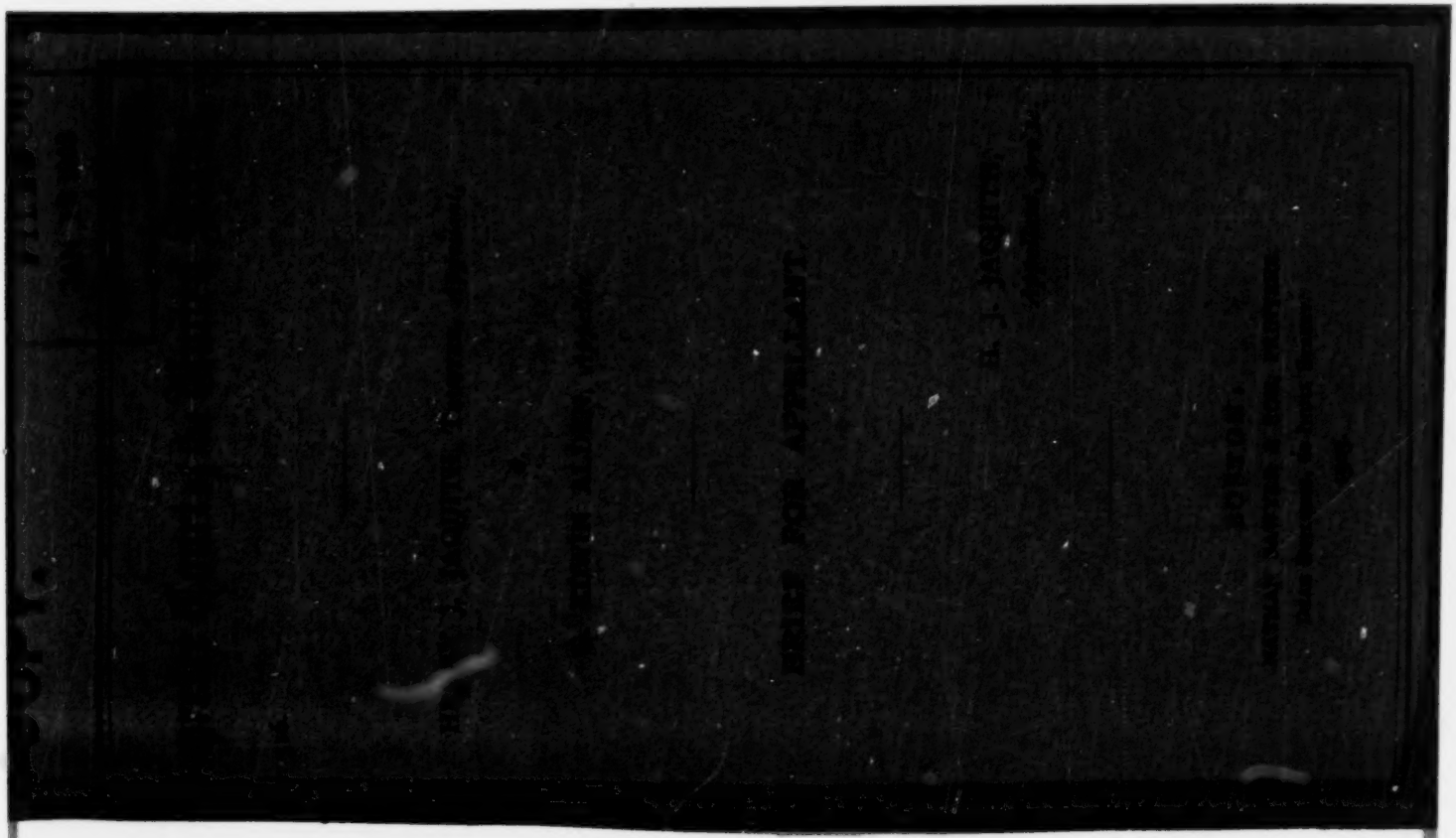


Supreme Court of the United States.

No. 516.

HARRY J. JAQUITH, TRUSTEE, *Appellant*,

v.

G. EDWIN ALDEN, *Appellee*.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

THIS is an appeal from the Circuit Court of Appeals of the United States for the First Circuit.

The appellee is a creditor of the bankrupt firm of F. N. Woodward & Co. As such creditor, he asked the allowance of his claim against the bankrupts' estate in the sum of $546.89 (Record, pp. 1 and 2). Upon a hearing before the referee it was found that the appellee had, during the insolvency of the bankrupts, received from them cash payments within four months prior to the bankruptcy to the amount of $1,591.63 (Record, pp. 2–4). Of this sum $633.80 was found to be a preference and allowance of the appellee's claim was conditioned upon its surrender (Record, p. 4).

All of the transactions were in good faith and in the regular course of the appellee's business (Record, p. 3).

The appellee had the question certified to the District Judge who reversed the referee and ordered the allowance of the claim (Record, pp. 4 and 5).

The appellant is the trustee of the bankrupt estate, and duly petitioned for an appeal to the Circuit Court of Appeals, which was allowed by the District Judge (Record, p. 6).

The case was duly heard by the Circuit Court of Appeals for the First Circuit, and a final decree entered October 28, 1902, affirming the decree of the District Court (Record, p. 9). On November 6th the appellant filed his petition for an appeal to this Court, together with an assignment of errors. This petition was allowed November 10, 1902, by Mr. Justice Peckham who certified that a determination of the questions involved was essential to a uniform construction of the Bankruptcy Act throughout the United States (Record, pp. 9 and 10).

Jurisdiction.

The jurisdiction of this Court is established by the certificate of Mr. Justice Peckham (Record, p. 10), Bankruptcy Act, section 25 (*b*) 2.

Lack of Uniformity of Decisions.

There is lack of uniformity of decision by the Courts of Appeals of the various circuits upon two points involved in enforcing section 60 (*c*) and 57 (*g*) of the Bankruptcy Act, and both are material to the judgment of the Circuit Court of Appeals for the First Circuit in Dickson *v.* Wyman, 111 F. R. 726, which by the opinion of the Court below is made the ruling case and the foundation of the judgment against the appellant.

The first point to which the appellant calls the attention of the Court is that in Dickson *v.* Wyman the Court allows a creditor to set off against a preference a credit without security, for property which became a part of the bankrupt's estate, which credit was given after a date four months prior to the adjudication, without regard to whether the credit so set off was subsequent to the preferential payment or not.

A mere reading of the opinion in Dickson *v.* Wyman does not show the real decision, as it uses the words "subsequent transactions," but an examination of the papers in the case shows that those words mean transactions subsequent to August 13, 1899, — that is, four months prior to the bankruptcy; and it has been so applied in this case, and it is submitted that the case has been misunderstood by the Courts of Appeals of other circuits who have cited and approved it coupled with a statement that the credits to be set off are those subsequent to the preferential payment.

All of the other Courts of Appeals hold that the credit to be set off must be subsequent to the preferential payment.

McKay *v.* Lee, 105 F.R. 923 (7th).
Mills *v.* Lewis, 110 F.R. 512 (9th).
Peterson *v.* Nash, 112 F.R. 311 (8th).
A. Steers Lumber Co., 112 F.R. 406 (2d).
In re Stege, 116 F.R. 342 (2d).
Kahn *v.* Cone, 115 F.R. 290 (5th).
Kimball *v.* Rosenham, 114 F.R. 85 (8th).
McNair *v.* McIntyre, 113 F.R. 113 (4th).
Morey *v.* Schiffer, 114 F.R. 447 (8th).
Gans *v.* Ellison, 114 F.R. 734 (3d).
In re Harpke, 116 F.R. 295 (7th).
Swarts *v.* Bardk, 117 F.R. 1 (8th).
Swarts *v.* Siegel, 117 F.R. 13 (8th).

The other point to which the appellant calls the attention of the Court is that the Court of Appeals for the First Circuit has decided in Dickson *v.* Wyman that under section 57 (*g*) and 60 (*c*) of the Act an innocently preferred creditor is not required to surrender payments received during the bankrupts' insolvency more than four months prior to the adjudication in order to be entitled to share in the estate.

A contra decision has been rendered by the Court of Appeals for the Second Circuit in *In re* A. Steers Lumber Co., 112 F. R. 406, and in two cases reported in the District Courts.

It may be said that the record in this case does not justify considering that point, but it was considered by the Court below in the Dickson *v.* Wyman decision and was discussed at the hearing in this case, and is of great importance to the appellant in administering his trust under the Bankruptcy Act, as nearly one-third of the claims of creditors in this bankruptcy case of F. N. Woodward & Co. are suspended, awaiting the final determination of the issues involved in this appeal; and so long as there are contra decisions by two or more eminent courts uncertainty will exist and injustice perhaps be done until this Court declares the law.

It seems to the appellant that the Act adopts four months as a limitation barring all inquiry into transactions untainted with fraud, or which are not void under local law (section 67 (*e*) or which are not repugnant to local re-enactments of the Statutes of Elizabeth relating to fraudulent conveyances (section 70 (*e*).

It seems that this view is supported by a consideration of the purposes of the Act and by reading the following sections:–

Sect. 3 (*a*) 2.
Sect. 3 (*b*).
Sect. 57 (*g*).
Sect. 60 (*a*, *b*, *c*).
Sect. 67 (*c*, *e*, *f*).
Sect. 68 (*b*).

An examination of forty-eight reported cases involving preferences has shown only seven where the report states insolvency or preferential payments more than four months prior to the adjudication.

In *In re* Gaylord (113 F. R. 131) the insolvency dated back nine months; only the items within four months are considered.

In Kimball *v.* Roseham (114 F. R. 85) the report does not state the date of the insolvency, but the Court considers the surrender of preferences dating back more than four months, but as the subsequent credits more than balanced all the preferences the question of limitation was not discussed. In C. S. Morey *v.* Schiffer (114 F. R. 447) the dealings covered some months prior to the adjudication but the Court marshalled only those within four months in determining the question of preference.

In *In re* Bullock (116 F. R. 667) the Court distinctly passed upon the question and ruled that preferences innocently accepted more than four months prior to the adjudication need not be surrendered in order to prove a claim.

Opposed to this view are three reported decisions —

In re Jones, 110 F.R. 736;
In re A. Steers Lumber Co., 110 F.R. 738;
In re A. Steers Lumber Co., 112 F.R. 406 (C.C.A.);

— the Court in the second case saying, "The Court is constrained to the conclusion that there is no time limit to the operation of section 60 (*a*)."

Argument.

I.

The first error assigned is —

1. That the Circuit Court of Appeals for the First Circuit erroneously determined that the appellee's claim as set out in the record did not show a preference under the Bankruptcy Act, which must be surrendered before the claim is allowed proof, and entered final judgment affirming the decree of the District Court allowing said claim without surrendering the preferential payments.

The case was heard by the District Judge on the referee's certificate (Record, p. 5), there being no dispute as to its statement of facts.

The language of the Bankruptcy Act is: "SECT. 60. *Preferred Creditors.* — (*a*) A person shall be deemed to have given a preference, if, being insolvent, he has . . . made a transfer of any of his property, and the effect of . . . such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"(*c*) If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

"SECT. 57. (*g*) The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

These sections were construed by this Court in Pirie *v.* Chicago Trust Co., 182 U.S. 438, and it was determined —

(*a*) That a payment of money is a transfer of property (p. 443).

(*b*) That if the payment will result in giving one creditor a greater percentage than another it is a preference (p. 446).

(*c*) That the innocence of the creditor does not prevent the transfer being a preference (p. 446).

(*d*) That such a preference must be surrendered before allowance of a claim (p. 456).

(*e*) That an intent on the part of the bankrupt to prefer is not necessary (p. 454).

(*f*) That a set-off of subsequent credits might not have been allowed but for section 60 (*c*) (p. 455.).

If we follow the language of section 60 (*c*) of the Act with exactness, and apply it to the case at bar, we have this result (see Record, p. 3):—

Appellee's credit to the bankrupts	Aug. 17, 1901	$289.46
" " "	" 28, "	657.89
		$947.35

The bankrupts became insolvent about August 15, 1901, and while insolvent, on September 4, 1901, made a payment to the appellee of $289.46, and on September 28, 1901, a further payment of $657.89, a total of $947.35, which diminished the bankrupts' assets and gave to the appellee a larger percentage than other unsecured creditors could receive from his estate, and was a preference (see section 60 (*a*) of Act).

On September 30, 1901, the appellee gave a new credit without security of $644.28, the merchandise becoming a part of the bankrupt estate; but as that credit was paid for in full October 29, 1901, it cannot be set off to reduce the preference (section 60 (*c*) of Act), and that payment does not constitute a preference, the general construction under section 60 (*c*) being that the new credit and its payment are to be regarded as one transaction, leaving the original preference unaffected if the new credit given is paid in full, the language of the section being that so much of the new credit as remains unpaid may be set off against the prior preference.

Peterson *v.* Nash, 112 F.R. 311 (C.C.A. 8th).
Kahn *v.* Cone Co., 115 F.R. 290 (C.C.A. 5th).
Kimball *v.* Rosenham, 114 F.R. 85 (C.C.A. 8th).
Morey *v.* Schiffer, 114 F.R. 447 (C.C.A. 8th).
Gans *v.* Ellison, 114 F.R. 734 (C.C.A. 3d).
McNair *v.* McIntyre, 113 F.R. 113 (C.C.A. 4th).

Following the language of section 60 (*c*) we find that the only unsecured credits given after these preferential payments of

$947.35, and which became assets of the estate and remained unpaid at the time of the adjudication, were —

October 18, 1901	$535.99
" 18, "	.50
" 21, "	10.40
	$546.89

Deducting this sum from the preferential payments of $947.35, we have a remainder of $400.46, which should be surrendered by the appellee as a condition precedent to his proving his claim for the correct sum of $947.35, — the amount of the debt due to him on which the preferential payments were made.

It may be stated as follows: —

Date of adjudication, November 26, 1901.
Date of actual insolvency, August 15, 1901.

1901.				
Sept. 4.	Preferential payment			$289.46
" 28.	" "			657.89
				$947.35
Sept. 30.	New credit	$644.28		
	Paid Oct. 29	644.28		
	No set-off.			
Oct. 18.	New credit	$535.99		
" 18.	" "	.50		
" 21.	" "	10.40		
	Total set-off			546.89
	Net preference			$400.46

When this is surrendered the provable claim will be —

Claim offered for proof	$546.89
Preference surrendered	400.46
Total	$947.35

— being the amount originally owed the creditor when the preferential payments began.

It is of just this situation that this Court spoke in Pirie *v.* Trust Co., 182 U.S. 438, 447, when it said: "There is certainly no ambiguity so far. What a preference is, is plain. What the effect of it is, if taken under the conditions mentioned, is equally plain. So taken, it may be recovered back; if not so taken, it may be kept or surrendered. Unless surrendered, he who received it cannot prove his debt or other debts."

Have the payments of $289.46 and $657.89 on the 4th and 28th of September, 1901, the earmarks of a preference as described by section 60 (*a*) of the Bankruptcy Act?

These earmarks are two: (*a*) *a transfer of the bankrupts' property*, — it is conceded that the payments were from the bankrupts' estate; (*b*) *that the transfer will result in giving to a creditor a greater percentage on his debt than other creditors of the same class will receive.*

The appellee is an unsecured creditor (Record, p. 2,) and, while the record is silent as to the exact condition of the estate, its assets and liabilities, — having been adjudicated bankrupts, it is a presumption of law that the estate will not pay one hundred cents on the dollar to the unsecured creditors, who are the lowest class in the sharing of assets.

Within the insolvent period the bankrupts owed the appellee $947.35; at the time of the adjudication the bankrupts owed the appellee $546.89; under any method of stating it, or on any percentage short of one hundred per cent., the appellee has received and will receive more on his original debt of $947.35 than another unsecured creditor for the same amount will receive; to illustrate: —

Appellee.		*Other Unsecured Creditor.*	
Original debt	$947.35	Original debt	$947.35
Offered for allowance .	546.89	Offered for allowance .	947.35
Dividend 99% . . .	$541.42	Dividend 99%, total received	937.88
Preferential payment .	400.46		
Total received . . .	$941.88		

— which shows that even if the estate paid ninety-nine per cent. that the transfer to the appellee has resulted in giving him a larger percentage on his debt than other creditors of the same class would receive. The estate has so far paid a dividend of ten per cent., and on that basis the difference works out as follows: —

Appellee.		*Other Unsecured Creditor.*	
Original debt	$947.35	Original debt	$947.35
Offered for allowance .	546.89	Offered for allowance .	947.35
Dividend 10%	54.69	Dividend 10%, total received	94.73
Preferential payment .	404.46		
Total received . . .	$459.15		

It is respectfully submitted that the record shows a preference under the Bankruptcy Act, which the appellee should surrender.

II.

The second and third errors assigned are —

2. That the final judgment entered allowed the appellee to set off credits given to the bankrupt without security, for property which became part of the debtor's estate, said credits having been given prior to the preferential payments.

3. That the final judgment entered erroneously decided that the question of preference under the Bankruptcy Act depended on whether on the date of the adjudication the appellee was owed more or less than was owed to him at a period exactly four months prior to the adjudication.

The District Judge in his opinion followed the law as laid down by the Court of Appeals for the First Circuit, citing *In re* Dickson (111 F. R. 726), the language of the Court in that case being: "In order to avoid so unreasonable a result, we may say that all the transactions covered by the account current should be regarded as one" (p. 728).

This Court has said that there is no ambiguity in section 60 (*a*, *b*, *c*), or in section 57 (*g*) of the Bankruptcy Act; it has also said concerning the construction of constitutions and statutes that "If the words convey a definite meaning which involves no uncertainty nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it."

Lake County *v.* Rollins, 130 U.S. 652, 670.

Section 60 (*c*) distinctly makes a preferred creditor's right to set off a credit to depend on whether the credit was subsequent to the preference, and this is incompatible with a construction of all transactions in an account as one. This Court has distinctly divided the transactions by saying "debt or other debts."

Pirie *v.* Chicago Trust Co., 182 U.S. 438, 447.

Under the Bankruptcy Act of 1867 this Court was asked to find in that Act what Congress did not put there. The Court in its opinion said: "The statute is clear and imperative. Its constitutional validity is not questioned. It contains no qualification. We cannot interpolate what is claimed. Such a function is beyond the sphere of our power and duty. It is

our business to execute the law as we find it and not to make or modify it."

Bank *v.* Sherman, 101 U.S. 403, 406.

Congress has enacted that if any creditor would share equally in the fund brought into court he must put himself on the level of all who are permitted to participate by giving up such property as he received from the bankrupt during his insolvency, when the effect of the retention of that property would be a larger percentage on his dealings with the bankrupt than other sharers in the fund would get; this is equitable equality enacted into statute law, and is the purpose of all bankruptcy legislation.

Bank *v.* Sherman, 101 U.S. 403, 406.

A review, in their order, of all the decisions upon these points by the Circuit Courts of Appeal of the United States would seem profitable, and especially upon the point as to what may be set off, for the decision of this Court in the Pirie case determined the two preliminary points necessary to be settled in this case, viz.: that there has been a preference, and that if there is no set-off it must be surrendered if the creditor would share in the estate.

In the Fixen case (102 F. R. 295), whose reasoning has the approval of this Court, the opinion states that a preference under section 60 (*a*) bars a proof, unless surrendered under section 57 (*g*) (p. 297). The question of set-off is not discussed, and on that point the valuable part of the opinion is its continual reiteration of the principle that real and effectual equality is the fundamental aim of the Act (pp. 297 and 298).

The next decision by a Circuit Court of Appeals was in the Seventh Circuit, McKey *v.* Lee, 105 F. R. 923. In that case the conclusion reached by the District Judge (p. 925) is as follows: —

1899.				
Sept. 17.	Credit to bankrupt			$874.52
" 23.	" "			93.84
" 23.	" "			1,050.10
" 23.	" "			112.50
" 25.	" "			184.00
" 28.	" "			196.68
" 28.	" "			35.61
" 28.	" "			23.05
	Total unsecured credit . . .			$2,570.30
Oct. 3.	Preferential payment . .	$500.00		
	Subsequent credit . . .	423.25		
	Net preference . . .	$76.75		
Oct. 18.	Preferential payment . .	334.56		
		$411.31		
Oct. 21.	Subsequent credit . . .	231.25		
	Net preference . . .	$180.06		
Dec. 1.	Subsequent credit . . .	54.00		
		$126.06		
Dec. 2.	Subsequent credit . . .	210.25		
	Further credit extended . . .			84.19
				$2,654.49
Dec. 22.	Preferential payment $500 (no subsequent credit), which was ordered surrendered.			

The Appeals Court held that section 60 (*c*) was applicable to the case of payments received in good faith by the creditors (p. 925), and the finding of the District Judge ordering the repayment of the preferential payment of $500 was affirmed.

Following the case of McKey *v.* Lee, in point of time, came Pirie *v.* Trust Co., 182 U.S. 438.

The Circuit Court of Appeals for the Ninth Circuit was the next Appeals Court to pass on the question, in Mills *v.* Lewis, 110 F. R. 512 (filed August 19, 1901). In that case the contention was squarely the same as that raised by the appellee in this case and was decided by the Circuit Court of Appeals squarely contra to the decision of the Circuit Court of Appeals in this case. The appellants, in Mills *v.* Lewis, sought to prove a claim for $1,138.29, but were ordered by the District Judge to surrender $288.60 paid them during insolvency. From this decision an appeal was taken, and to show the error the creditors relied upon prior credits given by them by which they showed that, taking the whole term of four months into account, the bankrupt estate had been enriched and not diminished, and hence argued that the payment was not a preference (p. 513). Of this claim the Court said (MORROW, J): "This claim on the part of the creditor is without foundation. The statute declares when a payment made by a bankrupt shall be deemed a preference. The state of the account between the debtor and the creditor at the time the payment is made has nothing to do with its character as a preferential payment."

The order of the District Judge was affirmed, negativing the claim that prior credits could be relied upon to set off a preferential payment.

Following this decision came the decision of the Circuit Court of Appeals for the Eighth Circuit, in Peterson *v.* Nash, 112 F. R. 311 (filed November 4, 1901). In that case the creditor sought to prove a debt of $3,058.29. The trustee prayed the surrender of $2,701.10 of payments received by the creditor during the insolvency. The creditor replied, showing *subsequent* credits given the bankrupt to the amount of $4,313.20 (p. 312). The District Judge ordered the claim allowed without any surrender; the trustee appealed, and the Appeals Court affirmed the order of the District Judge, using the identical illus-

tration used by the Circuit Court of Appeals for the First Circuit in its opinion filed eleven days later in *In re* Dickson. The Court said (p. 314): "The giving and receiving under such circumstances may properly enough be regarded as one transaction, resulting not in a preferential payment to the creditor, but, in reality, in the creation of an indebtedness in favor of the creditor for the difference between the two." It is to be noted that these words followed other words in which the Court found that section 60 (*c*) was applicable, not only to preferences under section 60 (*b*), but also to preferences received in good faith; and after that finding under the statute the Court discussed the general equity of the section, and then used the words quoted.

There is nowhere any intimation that the statutory requisite, that the credit, to be set off, must be subsequent, can be dispensed with, or that prior credits will avail in set-off.

After this decision in point of time the Court of Appeals for the First Circuit filed its opinion in *In re* Dickson (111 F. R. 726). Also cited as Dickson *v.* Wyman.

A query that forces itself upon the mind in considering *In re* Dickson, is, If the Court decided the question of set-off upon purely equitable grounds, and outside of the statute enacted in section 60 (*c*), where did the Court get the four months' limitation upon preferences that must be surrendered? Surely not in the general equity law, but in section 60 (*b*), which deals with fraudulent preferences; and if section 60 (*b*) applies equally, or furnishes a rule equally for preferences taken in good faith, then surely it is no stretch of construction to construe section 60 (*c*) as furnishing a rule for both fraudulent and innocent preferences; this position has been taken by every other Circuit Court of Appeals in the United States, except in the Sixth Circuit, no cases being reported from that circuit.

A consideration of the full account in *In re* Dickson, as filed in Court, showed two preferential payments: $562.73 and $456.82; thereafter every payment received was to balance a

new credit given, and was not a preference under the Act. On November 20th and December 11th there were two small preferences, $28.14 and $60.78, which, including above, make a total of $1,108.47.

As a set-off to this sum the creditor, after September 22d, gave new credits, without security, to the amount of $2,263.12, and manifestly there was no preference to be surrendered. If, however, a four months' limit is introduced, the preferential payments increase to $3,042.05, while the subsequent credits remain $2,263.12, and under the rule adopted in all other circuits there would be an unsatisfied preference of $778.93. This change is due to the fact that if the preferential payments begin September 5th, the number and amount of the subsequent credits are diminished.

It is an axiom in administering the law that no rule can be established which will not bear hard, and in a certain sense unjustly, upon some who are affected by it, and this is especially true of bankruptcy laws.

In the case of Dickson it was a hardship to enforce the consequences of a four months' limitation. For the creditor the whole term of the insolvency would have given more favorable results, but not so with most bankruptcies. It not infrequently happens that firms in good credit, yet bankrupt, do business for years before the crash comes, and it would be intolerable to open up such dealings years back as a prerequisite to allowing a claim. Equally: a rule that if a claim offered for proof was as large, or larger, than the claim existing four months prior to the adjudication, such claim should be allowed, would be intolerable, and would negative the purpose of the Act to insure an equitable distribution of the estate, as of the date of the adjudication, plus preferential transfers. Under such a rule, if A was owed nothing four months prior to adjudication he could accept payment of ninety per cent. and prove for ten per cent. of his subsequent dealings. It would seem that the same rule of computing a preference must be adopted, whether it be fraudulent

or innocent, for Congress has established the penalty and the Courts may not increase it, nor may they establish one rule of computation to protect one creditor, and another to punish a second creditor; again we may test the rule as construed by the Court of Appeals for the First Circuit by its operation, and inquire under what circumstances could a creditor taking a preference under section 60 (*b*) be held to return it if he was owed nothing four months before the adjudication, or left unpaid the same or a slightly greater balance due him than was due him four months before the adjudication?

The next opinion was filed by the Circuit Court of Appeals for the Second Circuit in *In re* A. Steers Lumber Co. 112 F.R. 406, which affirmed the decision of the District Judge and held that payments received in good faith more than four months prior to the adjudication, but during insolvency, must be surrendered as a preference before proving a subsequent credit. This decision is contra to all of the other Circuit Court of Appeals decisions.

Following in point of time is the decision of the Court of Appeals for the Fourth Circuit, in McNair *v.* McIntyre, 113 F. R. 113 (February 4, 1902) the opinion holding that preference within four months may be surrendered or retained at the creditor's option if the preference be innocently taken, but if retained all claim against the estate is lost.

The same Court, in an opinion filed March 4, 1902, in *In re* Stege (116 F. R. 342), passed upon the construction of section 60 (*a*) and, as there was no subsequent credit given, section 60 (*c*) was not discussed. Certainly a fair deduction to be drawn from the opinion is that the Court never considered the possibility of an argument that a prior credit could be set off to balance a preference, inasmuch as the facts stated showed banking transactions extending through the four months prior to the adjudication.

In the Fifth Circuit the Circuit Court of Appeals, by a majority decision and without an extended opinion, decided in the case

of Kahn *v.* Cone Co. (115 F. R. 290, filed March 15, 1902) that new credits might be deducted from preferential payments in determining the amount to be surrendered before allowance of claim. This opinion supports the appellant's contention, as he claims only the surrender of the balance of the preferential payments after all subsequent credits which remain unpaid have been deducted.

The Circuit Court of Appeals for the Eighth Circuit, in a very careful and able opinion by Judge Sanborn in Kimball *v.* Rosenham (114 F. R. 85, filed March 24, 1902), cited and approved *In re* Dickson as he understood it and reached the conclusion that the appellant contends for in this case. The facts in that case showed that within the period of insolvency the creditor had received preferential payments to the amount of $850, and that thereafter he had given the bankrupt new credits to the amount of $1,506, which formed a part of a total claim of $3,384.13 which the creditor offered for proof. The District Judge separated the account into two debts and allowed the $1,506, but as to the earlier portion of the claim he ruled that that could not be proved until the $850 was surrendered (p. 86).

The reasoning of the Court seems uncontrovertible, and on page 88 the Court says: "The entire account is not only one single claim, but it is one single continuing transaction, and in determining the existence of the alleged preferences, and in allowing its proof, it must be so considered. *In re Richter, 20 Fed. Cas. No. 11803; In re Dickson, 111 F. R. 726, 728.* If when the claim is thus considered, the payments made, and the *new* credits which *follow* them decrease the amount owing upon the claim, they may constitute a preference to the creditor; but if they increase it or leave it unaffected it is impossible for them to work such a 'preference' in his favor within the true meaning of that term in the bankrupt law."

The Court thereupon reversed the decision of the District Judge and ordered the allowance of the claim without any surrender of payments.

This is the appellant's contention in this case; and as the appellee cannot show new credits sufficient to set off the preferential payments, he contends that the balance, after the allowance of the set-off of subsequent credits, should be surrendered.

On the same day that the opinion was handed down in Kimball *v.* Rosenham the same Court handed down the opinion in Morey *v.* Schiffer, 114 F. R. 447. In that case during the insolvency the creditor received payments amounting to $221.26, and *subsequently* extended an unsecured credit of $444.03. The District Judge ordered the $221.26 to be surrendered before the claim would be allowed (p. 448).

The Court of Appeals cited *In re* Dickson, approved it, and, upon the same reasoning as in the Kimball *v.* Rosenham case, reversed the decision of the District Judge, and ordered the claim allowed without any surrender (pp. 449 and 450).

The next decision upon this question by the Appeals Court was made April 22, 1902, in the Third Circuit, in the case of Gans *v* Ellison, 114 F. R. 734.

The facts in that case are that during the insolvency the creditor received payments amounting to $1,800 and subsequently gave an unsecured credit of $1,703.15, upon the adjudication the creditor tendered $96.82, the net difference between the payments and the new credit, and offered his full claim for allowance, this allowance was ordered and the trustee appealed, claiming the surrender of the entire $1,800 (p. 735). The Court, by Judge Acheson, cites *In re* Dickson, as he understood it, approves it and affirms the order of the Court.

This case is an especially strong one for the appellant's contention, inasmuch as the total claim of the creditor was $6,671.89, and had the theory been entertained that prior as well as subsequent credits might be used to set off against preferences no tender or payment by the creditor would have been necessary. In the same opinion the Court disposes of Gans *v.* Harrington & Goodman, the facts being the counter-

part of the facts in Kimball *v.* Roseham, and the decision being the same as that reached by the Appeals Court of the Eighth Circuit in that case.

The next case involving a preference determined by an Appeals Court is *In re* Harpke (116 F. R. 295, filed May 6, 1902); that case was in the Seventh Circuit and did not involve a construction of section 60 (*c*). The Court found that the facts set out did not constitute a preference within section 60 (*a*) and disposed of the case on that ground. The facts set out showed a payment of a note by an endorser with funds supplied by the bankrupt, the creditor not knowing the source of the funds used to make the payment, — held not a preferential payment to the payee.

July 21, 1902, the Circuit Court of Appeals for the Eighth Circuit filed opinions in Swarts *v.* Fourth National Bank (117 F.R. 1) and Swarts *v.* Siegel (117 F. R. 13) in which the Court followed its ruling in Kimball *v.* Rosenham *supra*.

III.

It is submitted that the appellant's contentions are supported by the general provisions of the Act relating to set-off found in section 68.

That section provides — 68 (*a*)—

(*a*) That mutual debts may be set off.

(*b*) That mutual credits may be set off.

But there is no provision that mutual debts *and* credits may be set off; this would prevent any transfer being a preference.

Section 68 (*b*) provides: —

68 (*b*) 1. That no set-off or counter claim shall be allowed which is not provable against the estate: hence a debt that could not be proved because of a preference cannot be allowed in set-off except under the terms of section 60 (*c*).

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This is made especially clear by section 68 (*b*) 2, which allows proof of assigned claims innocently acquired within four months of the bankruptcy, yet such claims are barred as a set-off against a preference by section 60 (*c*).

The appellant, in discussing the points involved in this case, has endeavored to "plumb" his contentions with the provisions of the law enacted, and has not considered whether or not such provisions were what equity would award, — relying upon that equitable maxim, "Equity follows the law."

In closing, the appellant would respectfully call the attention of the Court to three simple propositions which seem to him certainly deducible from the facts and opinions appearing in the cases cited, and heretofore discussed. If these propositions be conceded he feels that his contention in this appeal will be sustained: —

1. That a payment not for a present consideration is a preference.

2. That only a subsequent credit can operate to discharge a preference.

Bankruptcy Act, section 60 (*c*).

3. That the term "new credit" has reference to a credit given after a preferential payment and not to one given after the commencement of the period of four months prior to the adjudication merely.

It has seemed that much of the confusion of the bar on the matter of preferences and set-off was due to incorrect methods of stating the transactions; as stated in Mills *v.* Lewis, 110 F. R. 502, the condition of the account when the payment is made has nothing to do with determining the question of preference and set-off. The fact of insolvency having been deter-

mined, a transfer of property becomes a preference, and the question of set-off is determined by a search for subsequent unpaid, unsecured new credits for property which became a part of the bankrupt estate.

That this is true a consideration of the Act will show.

Section 60 (*c*) uses the word "recoverable," now the appellant as trustee seeking to recover from the appellee, assuming that the transfer was with knowledge of the insolvency on the part of the appellee, would sue upon the following statement: —

1901.		
Sept. 4.	Cash paid in fraud of law . . .	$289.46
Sept. 28.	" " " " " " . . .	657.89
Oct. 29.	" " " " " " . . .	644.28
		$1,591.63

It would then be the appellee's part to plead in set-off, subsequent credits, given without security, for property which became part of the estate and which remained wholly or partially unpaid at the date of adjudication.

Now all of the credits prior to the date of the preferential payment on September 4, 1901, are barred by the language of the statute, so the appellee would first show that the last payment on October 29, 1901, was to pay for a further credit extended after the two former preferential payments. The law does not require or treat the preferential payment and the subsequent credit as one transaction, but it does regard the new credit and its payment as concurrent, and as not in any sense chargeable as a preference, for while a claim cannot be proved until a preference has been surrendered, a set-off may be proved and the partial payment on it retained (section 60 (*c*).

After the appellee had thus withdrawn the payment of $644.28, on October 29th, from the list of preferences, he would then set off the credits of October 18th and 21st, amounting to $546.89 and

the appellant would recover $400.46, — the balance of the preferential payments not covered by the set-off.

Just as the fact of the transfer increasing the creditor's percentage stamps the transfer as a preference so the enrichment of the estate determines the question of set-off; but there is a marked confusion of these two distinctions in the appellee's case: it is argued that there can be no preference if there is an enrichment of the estate, but the law and this Court unite in saying that it is the benefit to the creditor which determines the question of preference; the enrichment of the estate only becomes a factor when a claim of set-off is made.

It is respectfully submitted that, divergent as some of the earlier decisions may have been, later decisions have crystallized substantially on these points, and the weight of authority is with such later view, though strong reasons may appeal for a contra decision; yet if such reasons are carefully examined they will be found to be such as should appeal to the law-making power rather than to the co-ordinate branch of government which enforces the law as made.

The appellant respectfully submits that the terms of the Act require that the decision of the Court of Appeals should be reversed, and that the appellee should surrender his preference or his claim should be refused allowance.

H. J. JAQUITH,
Appellant, pro se.